

# Memorandum

Date: June 13, 2012

To: Joe Grindstaff  
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From: Dale K. Hoffman-Floerke  
Deputy Director  
Department of Water Resources

Subject: Subject: DWR General Comments on the Final Staff Draft of the Delta Plan (dated May 14, 2012)

The Department of Water Resources (DWR) has looked closely at the proposed Policies of the Final Staff Draft of the Delta Plan (Plan) and thinks, for the most part, that they provide a good framework that will be workable both for the Delta Stewardship Council (DSC) and those entities proposing and opposing certifications of consistency for covered actions. DWR appreciates the efforts of the DSC to carry out the Delta Reform Act which requires the Delta Plan to focus on providing guidelines and specific policies to help sponsors of covered actions determine consistency with the Delta Plan.

In this memo, DWR would like to take the opportunity to point out some highlights of issues and comments that DWR believes are important for the DSC to consider as it moves forward towards adopting the Plan. DWR will send additional general and specific comments on the Final Staff Draft of the Delta Plan in the next few days.

1. Chapter 2. The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) gave the DSC significant responsibilities, including to work with other interested entities to “establish a governance structure that will direct efforts across state agencies to develop a legally enforceable plan to meet the co-equal goals set forth in the implementing legislation”. DWR appreciates that changes from the previous version of the Plan now provides more emphasis on working collaboratively, getting entities on different sides of an issue working together to find solutions. DWR is hopeful that the “committee of agencies” that the Delta Reform Act requires the DSC to establish will be a useful forum for helping to resolve these issues in a positive and collaborative manner. Many agencies have different roles and responsibilities with regard to the Delta, including regulatory and management functions. The Plan identifies many of these agencies and their functions and has taken these in consideration during the development of the Plan. DWR expects that the DSC will work closely with these agencies in a way that reduces duplicative regulatory actions and identifies areas where more action – whether regulatory, informational or other – is desirable. The DSC can take a leadership role in facilitating continued interaction and alignment of these organizations leading to increased multi-objective planning and project implementation.

2. G P1, pages 56-57. Although the Plan states that it establishes an open and accountable governance mechanism for coordinating actions across agency jurisdictions and statutory objectives (page 18), the Policies appear to approach the goals of water reliability, environmental preservation and restoration, protection of the delta as an evolving place, and flood management in isolation. While DWR understands that this may be necessary in the first instance in order to identify potential problems and solutions, DWR suggests that the Plan would benefit by specifically encouraging proponents of covered actions to look at their projects in a holistic and sustainable way that considers whether and how they can advance the multiple goals and objectives of the Act.
3. G P1, pages 56-57. California is already seeing the effects of climate change and planning for and adapting to these changes will be among the most significant challenges facing managers this century. The final Staff Draft of the Delta Plan acknowledges these potential impacts. The Delta Plan is intended to address intertwined challenges and establish foundational actions for long-term Delta management. To further this cause, we believe the DSC has a unique opportunity to provide leadership that improves climate change adaptation and mitigation planning and project implementation in the Delta. State and local agencies are starting to incorporate these considerations into project planning as a result of various state-level actions including EO S-3-05, EO S-13-08, SB97, AB32, and SB 375. To help further these efforts and to encourage and promote more consistent planning in the Delta, the DSC should consider adding a requirement that all covered actions must conform to State guidance for addressing climate change, including incorporating sea-level rise (SLR) projections into project planning and decision making and ensuring consistency with State adaptation and mitigation strategies, actions, and goals established in the 2009 California Climate Adaptation Strategy and the AB 32 Scoping Plan.
4. Excluded actions, page 53. DWR supports excluding all one year water transfers as covered actions. The Final Staff Draft only exempts transfers exempted from CEQA under Water Code section 1729 from review as covered actions. This would exempt post 1914 water rights which are reviewed by the SWRCB under an expedited review process. It would exclude pre-1914 water rights which do not go through the SWRCB but which are subject to CEQA and other laws. State policy encourages water transfers, which can result in a more efficient use of water benefiting both the buyer and seller. Transfers, however, are highly dependent on water availability, and the window for completing transfers is very

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short. DWR appreciates that DSC staff have worked closely with staff in recent weeks to resolve this issue to our level of comfort. DWR recommends that the DSC keep the language that was in the fifth draft that exempted temporary water transfers of up to one year in duration from review as covered actions since all transfers are either subject to SWRCB review or review under CEQA and/or NEPA. DWR recognizes that there may be ways of making more information available to the public about how transfers work and how much water is transferred and would be willing to work with the DSC and other interested parties on ways to provide such information.

5. WR P1, page 100. DWR has questions about how WR P1 will be applied. WR P1 applies to exports or transports of water from the Delta and Delta use. It requires water suppliers to reduce reliance on the Delta by a significant reduction in net water use, or in the percentage of water used, from the Delta watershed. One way of doing this is for water suppliers to show they are complying with the laws regarding water conservation, water efficiency and urban and agricultural water management planning. DWR exports or transports water from the Delta, but it is not a water supplier. The SWP contractors and their members are water suppliers but they do not export water from the Delta. Does this mean that the DSC does not consider this policy to apply to DWR exports or transfers?
6. DWR's determination that the Plan provides a workable framework for all parties is based, in part, on the following assumptions:
  - Appendix B. The DSC Administrative Procedures recognize that it is the agency proposing an action that decides the action is a covered action and whether it is consistent with the Plan. Anyone challenging an agency decision claiming that the action is not a covered action does not appeal the action to the DSC but rather to a court of appropriate jurisdiction. Anyone challenging an agency decision which finds its action is consistent with the Plan can appeal the action to DSC. The DSC looks to whether the agency decision is supported by substantial evidence. The DSC decision can be appealed to a court of appropriate jurisdiction.
  - G P1, pages 56-57. As G P1 states, there will inevitably be times when a covered action will be consistent with some, but not all, of the Policies. As DWR reads all the Policies together, including G P1, the Plan recognizes

that there will be times when it is not feasible for a covered action to be fully consistent with all relevant policies. In that case the agency proposing the action can show consistency with the Plan by showing that the project is consistent with the Delta Reform Act legislation and its mandate to achieve the two co-equal goals.

- G P1, pages 56-57. Although the Plan clearly applies to specific projects, DWR expects that it, and probably other agencies, will be bringing whole programs or plans to the DSC with consistency findings. This is because DWR current planning efforts are designed to achieve the goals and objectives of the Delta Reform Act and conform with DWR's Sustainability and Environmental Stewardship Policies. While some parts of the program or plan may appear to be inconsistent with one or more policies; overall the program or plan will be designed to advance all the goals and objectives.
  - G P1, pages 56-57. GP P1 requires proposing agencies to include applicable mitigation measures identified in the Plan EIR or measures that are equally or more effective, but it also includes the concept of feasibility. DWR reads the Policies together as recognizing that CEQA lead and responsible agencies maintain their ability and responsibility to reject mitigation measures in the Plan EIR as infeasible and to adopt Statements of Overriding Considerations.
  - G P1, pages 56-57. G P1 requires proposing agencies to certify that the covered action complies with certain laws. DWR does not read this policy as meaning that the agency certifying the action or DSC can interpret those laws to determine compliance. DWR understands that the basis for an agency's certification would be that no agency or court has found that the covered action does not comply with those laws
7. G P1, pages 56-57. The Policies set forth a number of requirements to which proposing agencies must certify consistency. The Plan and Policies are general and do not provide a lot of detail regarding what the DSC will consider adequate when it is reviewing challenges. DWR supports this approach because there is so much variability in what may be considered a covered action. However, DWR expects that the DSC would consider the following:

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- Many potential covered actions will be routine and/or small but still subject to a Negative Declaration or Environmental Impact Report under CEQA. DWR expects that the DSC will accept analyses for such projects that provide reduced or limited discussions of topics such as best available science and adaptive management and that it will facilitate streamlined review of some of these projects as their scope becomes clearer.
  - DWR expects that some (or many) of its covered actions will be plans or programs and that specific projects that fall under a plan or program for which a consistency certification has been made will be able to go forward without any further certification.
8. RR P1, pages 271-2. RR P1 states that the DSC will take the lead, working with DWR and the Central Valley Flood Protection Board to prioritize state investments in Delta levees. As you know DWR and the Board have been looking at this issue for a number of years. We recognize that the prioritization will change over time to meet society's needs.

DWR looks forward to working with the DSC and the Board, the federal government and local agencies on this process. If you have any questions regarding DWR's comments, please contact me, or your staff can contact Sean Bagheban at 916-651-0870

(signed by)

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